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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA - SAN FRANCISCO

10 HUBB SYSTEMS, LLC,

Case No.: C07-02677 BZ

11 Plaintiff,

12 vs.

13 MICRODATA GIS, INC.,

14 Defendant.

**NOTICE OF MOTION AND MOTION
FOR PRELIMINARY INJUNCTION;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION**

15 Date: August 1, 2007
16 Time: 10:00 am
Courtroom G
Magistrate Judge Bernard Zimmerman

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION CASE NO.: C07-02677 BZ

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1 TO DEFENDANT MICRODATA GIS, INC. AND ITS ATTORNEYS OF RECORD
 2 HEREIN:

3 PLEASE TAKE NOTICE that on August 1, 2007, at 10:00 a.m. or as soon thereafter as
 4 the matter may be heard in Courtroom G of the above entitled Court located on the 15th Floor,
 5 450 Golden Gate Avenue, San Francisco, California, Plaintiff Hubb Systems, LLC's ("Hubb" or
 6 "Plaintiff") will move the Court for a preliminary injunction preventing Defendant microDATA
 7 GIS, Inc. from using Hubb's "DATA911" federally registered and incontestable trademark
 8 pursuant to the Lanham Act (15 U.S.C. §1051, *et seq.*) and on the grounds that Hubb's
 9 trademark infringement claim has probable success on the merits, and that Hubb will suffer the
 10 possibility of irreparable harm if no injunction granted.

11 This motion is based on this Notice of Motion and Motion, the following Memorandum
 12 of Points and Authorities, the Declarations of Scott Beisner and David C. Lee, and the pleadings
 13 and papers filed herein.

14 **MEMORANDUM OF POINTS AND AUTHORITIES**

15 I. **PRELIMINARY STATEMENT**

16 Defendant, a head to head competitor, infringed on Hubb's mark using a virtually
 17 identical trademark to that of Hubb's well-known and federally registered mark "DATA911" --
 18 a mark that is federally recognized as "incontestable" under 15 U.S.C. §§ 1058 & 1065.

19 Hubb has designed, manufactured, and continues to sell mobile hardware and software
 20 systems for public safety under the federally registered trademark DATA911. Hubb's products
 21 are sold to a category of consumer most needing reliable and authentic products: public safety
 22 agencies. Hubb's full product line, sold under the mark DATA911, includes mobile computing
 23 systems, digital video processing units, handheld devices, software programs including
 24 computer aided dispatch ("CAD") and automatic vehicle location ("AVL"), and customized
 25 systems.

26 Recently, Hubb learned that Defendant, microDATA GIS, Inc. ("Defendant"), has
 27 changed its trademark and name of many years and commenced using a virtually identical mark

1 to that Plaintiff's DATA911 trademark in the identical industry (*i.e.*, public safety), and began
 2 selling software including CAD and AVL to the public safety community. The public is likely
 3 to be confused by Defendant's conduct. While the likelihood of confusion over the source of
 4 goods sold in commerce is, in and of itself, enough to warrant injunctive relief, such relief is
 5 particularly needed where the goods at issue are sold to emergency response agencies, which
 6 rely on them to save lives on a daily basis.

7 Judicial intervention is now urgently required to avoid imminent harm and to ensure that
 8 the public does not continue to confuse Defendant's business for that of Plaintiff. Pending the
 9 determination of the requests for permanent relief set forth in the Complaint, Plaintiff seeks a
 10 narrowly tailored preliminary injunction as follows:

11 (a) prohibiting Defendant from using for any purpose the trademark "Data911"
 12 which has been continuously used in commerce by Plaintiff and its predecessor in interest since
 13 1989;

14 (b) requiring Defendant to change its trademark and name so that the phrase
 15 "Data911" will not be included in such name;

16 (c) requiring Defendant to turn over possession and control to Plaintiff of the
 17 internet domain name "microdata911.com;"

18 (d) requiring Defendant to deliver up to Plaintiff's counsel for destruction any
 19 materials that contain imitations of the trade name or that contain marks that are confusingly
 20 similar to the Plaintiff's trademark, logo, or advertising, including any that include the term
 21 "Data911"; and

22 (e) ordering expedited discovery to determine the extent and breadth of Defendant's
 23 infringing activities.

24 **II. BACKGROUND FACTS**

25 Plaintiff is a California limited liability company with its principal place of business in
 26 Alameda, California. Defendant is a Vermont corporation with its principal place of business in
 27 St. Johnsbury, Vermont.

28

1 Since no later than 1989, Plaintiff or its predecessors in interest, and their agents and
 2 assigns, have designed, manufactured, and sold mobile hardware and software systems sold to
 3 and used by emergency response agencies (police and fire departments) for public safety
 4 application under the trade name and trademark "Data911." Plaintiff's products include mobile
 5 computing systems, digital video processing units, hand held devices, software programs
 6 including CAD and AVL, and customized systems. These products are used to prioritize and
 7 maximize efficient responses to emergency situations.

8 Plaintiff has marketed its products and services throughout the United States and
 9 routinely attends numerous public safety trade shows attended by numerous law enforcement
 10 other public safety agencies. As a result of Plaintiff's substantial advertising and promotional
 11 efforts for its goods and services, as well as its dedication to providing high quality goods and
 12 services, Plaintiff's "Data911" trademark is widely and favorably recognized and relied upon by
 13 the relevant trade and consuming public as indicating high quality goods and services
 14 originating exclusively from Plaintiff. Due to these extensive marketing efforts, Plaintiff's mark
 15 has engendered valuable goodwill.

16 Plaintiff has consistently and continuously used the "Data911" mark in commerce since
 17 1989. In order to protect the extensive goodwill of Plaintiff's mark, Plaintiff sought and
 18 obtained a federal registration for its mark, "DATA911," for computer software in the field of
 19 public safety on the Principal Register of the United States Patent and Trademark Office
 20 Registration Number 2,546,009, with a registration dated March 12, 2002. On May 24, 2007,
 21 this registration became incontestable under 15 U.S.C. §§ 1058 & 1065. An incontestable status
 22 upon the Principal Register is conclusive evidence of the validity of the registered mark, of the
 23 registrant's ownership of the mark, and the registrant's exclusive right to use the registered mark.
 24 Lanham Act, 15 U.S.C. § 1115(b).

25 In or about January, 2007, Plaintiff first became aware that Defendant -- who also
 26 designs, manufactures and sells software including mapping, CAD and AVL features to the
 27 public safety community -- had changed its trade name from "microDATA GIS" to

1 "microDATA 911" and was using this mark to advertise competing products in the public safety
 2 sector. Defendant uses its new trademark and name to market its products to public safety
 3 agencies. Plaintiff's investigation has revealed that in 2006, despite Plaintiff's registered
 4 trademark, Defendant poached the "DATA911" mark for use in a second URL,
 5 "microDATA911.com." That website, in actuality, is a portal site that routes internet users
 6 searching for "DATA911" to Defendant's primary website ("microdatagis.com"). See,
 7 Declaration of David C. Lee ("Lee Decl.") at ¶ 3.

8 **III. LEGAL ARGUMENT**

9 The Lanham Act (15 U.S.C. § 1051, *et seq.*) constitutes the sole source of federal law
 10 governing the infringement of trade and registered marks. The objectives of trademark law are:
 11 "(1) to protect consumers from being misled as to the source of the products, (2) to prevent
 12 impairment of the trademark's value to its owner, and (3) to achieve both of the preceding two
 13 objectives consistent with free competition." E-Systems, Inc. v. Monitek, Inc., 720 F.2d 604,
 14 607 (9th Cir. 1983).

15 A registered trademark is recognized as a form of business property that vests an owner
 16 with a property right to prevent consumer confusion as to who produced certain goods, and to
 17 facilitate the distinction of that owner's goods. Order of Job's Daughters v. Lindeburg & Co.
 18 (9th Cir. 1980) 633 F.2d 912, 919.

19 **A. A Preliminary Injunction Should Issue Prohibiting Defendant From**
Using Plaintiff's Federally Registered Trademark "DATA911"

21 It is undisputable that Plaintiff (or its predecessor) has continuously used the trademark
 22 "DATA911" since 1989, and therefore Plaintiff established a common law right to that
 23 trademark and name. See, Declaration of Scott Beisner ("Beisner Decl.") at ¶ 2. A party who
 24 uses a trademark on an unregistered basis has a common law right to that mark. North Carolina
 25 Dairy Foundation, Inc. v. Foremost-McKesson, Inc. (1979) 92 Cal.App.3d 98, 106. In other
 26 words, trademark rights are acquired through use of a trademark, and not simply through
 27 registration. Paul Sachs Originals Co. v. John Sacs and Leo Hirsch, 217 F. Supp. 407, 411

1 (1963 C.D. Ca.). In addition to using this mark for 18 years, Plaintiff federally registered the
 2 "DATA911" trademark specifically relating to computer software in the field of public safety on
 3 the Principal Register of the United States Patent and Trademark Office Registration Number
 4 2,546,009, on March 12, 2002. Plaintiff's trademark became "incontestable" and exclusive to
 5 Plaintiff on May 24, 2007. Lanham Act, 15 U.S.C. § 1115(b). Beisner Decl. at ¶ 7.
 6 Accordingly, Plaintiff seeks to enjoin Defendant's open and infringing use of "DATA911" in its
 7 new trademark and name "microDATA911."

8 To enjoin an infringement on its federal trademark, the moving party must show either:
 9 (1) a combination of probable success on the merits and the possibility of irreparable harm, or
 10 (2) the existence of serious questions going to the merits and the balance of hardships tipping in
 11 its favor. Owner-Operator Independent Drivers Ass'n, Inc. v. Swift Transportation Co., Inc.,
 12 367 F.3d 1108, 1111 (9th Cir. 2004). Plaintiff can readily establish a combination of probable
 13 success on the merits and the possibility of irreparable harm.

14 **1. Defendant's Use Of Plaintiff's "Data911" Creates A**
 15 **Likelihood Of Confusion**

16 The test to determine likelihood of success in trademark infringement claims focuses on
 17 the "likelihood of confusion" between the plaintiff's mark and the allegedly infringing mark.
 18 Dr. Seuss Enterprises, L.P. v. Penguin Books, 109 F.3d 1394, 1396, n.2 (9th Cir. 1997). See
 19 also, 15 U.S.C. §1125(1)(1)(A) (defining infringement as a use which is "likely to cause
 20 confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association" of
 21 the user with the senior user). "Likelihood of confusion" equates to the inquiry of whether "the
 22 similarity of the marks is likely to confuse customers about the source of the products."
 23 American Circuit Breaker Corp. v. Oregon Breakers Inc., 406 F.3d 577, 584 (9th Cir. 2005).

24 The Ninth Circuit has adopted an eight-factor test to analyze the likelihood of confusion
 25 in all trademark cases. Dr. Seuss Enterprises, 109 F.3d at 1404. The factors include:

- 26 • strength of the mark;
 27 • proximity of the goods or services;

- similarity of the marks;
 - evidence of actual confusion;
 - marketing channels used;
 - type of goods and the degree of care likely to be exercised by the purchaser;
 - defendant's intent in selecting the mark; and
 - likelihood of expansion of the product lines.

7 Dr. Seuss Enterprises, 109 F.3d at 1404, citing AMF Inc. v. Sleekcraft Boats, 599 F.2d 341
8 (9th Cir. 1979) (the "Sleekcraft factors"). The list is not exhaustive and other factors may be
9 considered depending on the particular factual circumstances. Id. "Some factors are much more
10 helpful than others, and the relative importance of each individual factor will be case
11 specific...[I]t is often possible to reach a conclusion with respect to likelihood of confusion after
12 considering only a subset of the factors." Thane Intern., Inc. v. Trek Bicycle Corp., 305 F.3d
13 894, 901 (9th Cir. 2002), (internal citation omitted). Applying the Sleekcraft factors to the
14 present facts, the likelihood of confusion between Plaintiff's "DATA911" mark and Defendant's
15 use of "microDATA911" is undeniable.

(a) Strength of the Mark

The "strength" of a mark refers to its uniqueness. Sleekcraft, at 349. The stronger (or more unique) a mark, the more likely a consumer will think that a product comes from a particular source. Nutri-System, Inc. v. Con-Stan Indus., Inc. 809 F.2d 601, 605 (9th Cir. 1987). Certain marks are deemed "inherently distinctive" and therefore afforded the greatest amount of protection against infringement. Official Airline Guides, Inc. v. Goss, 6 F.3d 1385, 1390 (9th Cir. 1993). "Fanciful, arbitrary and suggestive marks are considered 'inherently distinctive.'" Id. As aptly summarized by the Ninth Circuit Court in Official Airline Guides:

A fanciful mark is a coined word or phrase, such as Kodak, invented solely to function as a trademark. *See, Eastman Kodak Co. v. Rakow*, 739 F.Supp. 116 (W.D.N.Y. 1989). An arbitrary mark consists of common words arranged in an arbitrary way that is non-descriptive of any quality of the goods or services. *See Stork Restaurant, Inc. v. Sahati*, 166 F.2d 348, 355 (9th Cir. 1948) ("[The Stork Club] is in no way descriptive of the appellant's night club, for in its primary significance it would denote a club for

storks.”). A suggestive mark, such as [the trademark] 360° for sneakers, requires imagination to make a connection between the mark and an attribute of the product.

Official Airline Guides, 6 F.3d at 1390-91.

In contrast, weak marks that simply describe the attributes or quality of a good or service are deemed "descriptive," and therefore warrant less protection from infringement (e.g., "Park 'N Fly" was deemed descriptive as applied to airport parking and shuttle bus service, see Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985)). Nevertheless, even descriptive marks warrant protection if a "secondary meaning" is established.¹

9 Here, "DATA911" is a coined term as described by the Ninth Circuit because the term
10 has no independent literal meaning standing alone. Put another way, "DATA911" in normal
11 parlance has no immediately recognizable meaning or context (*i.e.*, is not "descriptive" of the
12 goods sold by Plaintiff"), and therefore is distinctive in nature. While "DATA" and "911" each
13 have independent meanings standing alone, they have been combined by Plaintiff as a
14 trademark; and through this new combination of words Plaintiff has created a unique term that
15 connotes the source of the goods and services it offers. In the context of trademark law, the
16 "validity and distinctiveness of a composite trademark is determined by viewing the trademark
17 as a whole, as it appears in the marketplace" and not by analyzing its component parts or words.
18 Official Airline Guides, 6 F.3d at 1392. At the very minimum, the mark is "suggestive" in that
19 it requires some imagination on the part of a consumer to make a connection between the mark
20 and the attributes of the software products sold by Plaintiff.

By this measure, Plaintiff's "DATA911" mark is inherently distinctive and therefore warrants the legal protection against infringement.

(b) Proximity of Goods

24 Where the goods of Plaintiff and Defendant appear related, "the danger presented is that
25 the public will mistakenly assume there is an association between the producers of the related

²⁷ A mark acquires secondary meaning if customers associate the mark with a particular source. *Official Airline Guides, Inc. v. Goss*, 6 F.3d 1385, 1391 (9th Cir. 1993).

1 goods, though no such association exists." Sleekcraft, at 350. Thus, related goods "are more
 2 likely than non-related goods to confuse the public as to the producers of the goods." Official
 3 Airline Guides, at 1392.

4 Plaintiff develops and markets very sophisticated and comprehensive software that
 5 integrates emergency call-handling functions of a dispatcher with mapping technology.
 6 Defendant also markets products that are very similar in function to Plaintiff's: products
 7 including middleware computer aided dispatch (CAD) software, automatic vehicle location
 8 (AVL), and mapping software. Specifically, Defendant's "xTrakker 9-1-1," "xAVL," and
 9 "xCAD" software products essentially mirror the functionality of Hubb's AVL and CAD
 10 products. Both products permit emergency response dispatchers (e.g., 911 operators), using
 11 mapping software, to visually monitor the simultaneous locations of the caller, the scene of the
 12 reported incident, and the available field resources (i.e., police, fire, and medical) in direct
 13 proximity to the incident. See, Beisner Decl. at ¶ 10. These products therefore assist
 14 dispatchers in facilitating and coordinating emergency responses to any given incident. Both
 15 products also permit the computer mapping display to be transmitted to onboard computers in
 16 the emergency response vehicles of various field resources allowing the driver to effectively see
 17 the same display as the dispatcher. The commonality between these specific products is
 18 therefore undeniable.

19 Moreover, Defendant's target market -- the public safety community (i.e., law
 20 enforcement and health and safety agencies) -- is identical to that of Plaintiff. While it is clear
 21 that each company also markets other types of goods (such as PC hardware or GIS systems),
 22 this fact does not diminish the reality that both companies also market competing mapping and
 23 call-handling products used for emergency response services.

24 Accordingly, there exists a strong likelihood that the public will be confused about the
 25 source of Plaintiff's goods vis-à-vis those of Defendant.

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(c) Similarity of Marks

Courts assess the similarity of marks in terms of "sight, sound, and meaning" in their entirety, and as they appear in the marketplace. Official Airline Guides, at 1392. The similarity of marks are weighed more heavily than any differences between them. *Id.*

5 There can be little dispute but that Defendant's mark "microDATA911" is virtually
6 identical to Plaintiff's mark "DATA911." The two marks incorporate the exact same term
7 originally coined by Plaintiff ("DATA911"), and therefore are strikingly similar in sound and
8 sight. Lest there be any room for random coincidence, Defendant's "microDATA911" mark
9 purposely capitalizes the letters in "DATA911" to emphasize the similarities to Plaintiff's
10 federal trademark. Lee Decl. at ¶ 4. Defendant's addition of the term "micro" (which obviously
11 is "descriptive" in the context of computers and software) does little, if anything, to distinguish
12 Defendant's mark from Plaintiff's.

13 The intended meaning of Defendant's infringing mark is also identical to the meaning of
14 Plaintiff's mark, "DATA911." Where the words in a mark are the same (as here), the meaning is
15 synonymous. Sleekcraft, at 352. Plaintiff's mark, cultivated through continuous and extensive
16 marketing efforts over the nearly two decades, has garnered a specific meaning within the public
17 safety agency marketplace: hardware and software products designed specifically for public
18 safety agencies. Defendant's infringing mark, on its face, seeks to capitalize on this meaning by
19 associating emergency-tasked public agencies with the compilation and mapping of information.

Based on the above, the sight, sound, and meaning of Defendant's mark as compared to Plaintiff's, is without doubt, significantly similar, particularly as the similarities outweigh any minor differences (to the extent any exist). Official Airline Guides, at 1392.

(d) Marketing Channels Used

24 "Convergent marketing channels increase the likelihood of confusion." Nutri-System,
25 809 F.2d, at 606. Therefore, where the marketing efforts of Plaintiff and Defendant to solicit
26 consumers are the same, confusion is inevitable.

1 In this case, the universe of potential consumers of Plaintiff and Defendant's goods is
2 extremely confined -- public safety agencies -- and both parties market their respective goods
3 and services to the same population of potential customers. For years, Plaintiff has dedicated
4 the majority of its marketing efforts to participating in public safety tradeshows and conventions
5 as an exhibitor. In particular, Plaintiff targets conventions/tradeshows organized by the
6 Association of Public Safety Communications Officials ("APCO") -- an entity that has multiple
7 conventions worldwide and attracts decision-makers involved in public safety communications;
8 the very audience targeted by both Plaintiff and Defendant. In August 2007, Plaintiff intends to
9 participate in the APCO's International Conference and Exposition in Baltimore, Maryland --
10 one of the biggest public safety expos in the world, and a critical marketing channel for
11 Plaintiff.

12 Not surprisingly, Defendant targets and participates in the same tradeshows and
13 conventions as Plaintiff, including numerous APCO events. Indeed, in 2007 alone, Defendant
14 and Plaintiff have already or will attend many of the same conventions. Beisner Decl., at ¶ 12.
15 For instance, Defendant, like Plaintiff, intends to attend and showcase its public safety products
16 at the APCO Baltimore convention in August 2007 -- a fact confirmed on its internet website
17 ("www.microDATA911"). Beisner Decl. at ¶ 13 and Exhibit B.

18 Accordingly, any claim that Defendant is utilizing different marketing channels than
19 Plaintiff is without merit. Not only is Defendant infringing on Plaintiff's "DATA911" mark, it is
20 marketing its improper trade name to the same population of consumers, in the same venues as
21 Plaintiff.

(e) Defendant's Intent

23 This Sleekcraft factor evaluates whether the alleged infringer "knowingly adopts a mark
24 similar to another's." Official Airline Guides, at 1394. If so, courts will presume an intent to
25 deceive the public. *Id.*

Prior to its infringement of Plaintiff's mark, Defendant indisputably was aware of Plaintiff's trademark and products. Indeed, Defendant's website boasts that it is has been in

1 business for over 15 years (almost exclusively using the trademark and name "microDATA
2 GIS" during that time prior to infringing on Plaintiff's "DATA911" mark). See Lee Decl., at
3 ¶ 6. Plaintiff has occupied market share in that same industry for an even greater time.
4 Accordingly, any claim that Defendant was unaware of Plaintiff's mark is dubious, as Plaintiff
5 and Defendant have crossed paths numerous times at various tradeshows and conventions.
6 Beisner Decl., at ¶ 12.

7 Defendant's decision to knowingly infringe upon Plaintiff's mark and to incorporate it
8 into its own trademark and name therefore manifests its intent to deceive the public.

(f) Likelihood of Expansion of Product Lines

When there is "a strong possibility that either party may expand his business to compete with the other" such a showing "will weigh in favor of finding that the present use is infringing." Sleekcraft, at 354. Therefore, "when goods are closely related, any expansion is likely to result in direct competition." Id.

14 Defendant, for years, has developed and marketed Geographical Information System
15 ("GIS") products; a system capable of capturing, storing, analyzing, and displaying
16 geographically referenced information (i.e., data identified according to its location).
17 Defendant, however, has now expanded its product lines to include mapping and AVL software
18 that can be integrated with CAD programs to assist emergency-call dispatchers in managing,
19 prioritizing, and addressing emergency calls -- the very industry targeted by Plaintiff.
20 Accordingly, there is little question that Defendant's expansion of its mapping capabilities into
21 the public safety arena, as well as its development of AVL and CAD-based products will result
22 in competition with Plaintiff's own products.

To summarize: Defendant and Plaintiff compete: (1) in the same industry; (2) for the same customers; and are (3) developing and marketing the same types of public safety software products. The two parties are competitors in the public safety marketplace. Accordingly, the likelihood that "that one or both parties will enter the other's submarket with a competing model" is not only "strong" but a certainty -- it is occurring now. *Id.* Combined with the fact

1 that Defendant has infringed on Plaintiff's trademark, "DATA911," it is reasonable to foresee
 2 that the consuming public may consider "microDATA911" a subsidiary or division of Plaintiff,
 3 or otherwise be confused about the source of the goods sold.

4 **2. Defendant's Trademark Infringement, By its Very Nature,**
 5 **Results in the Requisite Harm for a Preliminary Injunction.**

6 Plaintiff can also readily establish its irreparable injury resulting from Defendant's
 7 infringement activities. "Trademark infringement by its very nature results in irreparable injury
 8 since the attendant loss of goodwill, reputation and business cannot adequately be quantified
 9 and the trademark owner cannot adequately be compensated." Pepsico, Inc. v. Tones, 1993
 10 U.S. Dist. LEXIS 17588 *9 1993 WESTLAW 455222 (C.D.CA. 1993). Once a party shows a
 11 likelihood of success on the merits of a Lanham Act claim, "irreparable injury may be
 12 presumed...This presumption effectively conflates the dual inquiries of this prong into the
 13 single question of whether the plaintiff has shown a likelihood of success on the merits."
 14 Goto.com, Inc. v. The Walt Disney Co., 202 F.3d 1199, 1205, fn. 4 (9th Cir. 2000) (emphasis
 15 added); accord, Cadence Design Sys., Inc. v. Avant! Corp., 125 F.3d 824, 826-27 (9th Cir. 1997)
 16 ("a presumption of irreparable injury arises if the plaintiff is able to show a likelihood of success
 17 on the merits of [a] copyright infringement claim").

18 Therefore, in the context of trademark disputes, "once a clear and deliberate
 19 infringement of an incontestable mark is shown, the owner of the mark is entitled to injunctive
 20 relief..." United Council of YMCAs of the United States of America v. The Columbia YMCA,
 21 1988 U.S. Dist. LEXIS 16535 *9, 1988 WESTLAW 144985 (D.S.C. 1988) (emphasis supplied).
 22 Moreover, "it is ordinarily presumed that the plaintiff will suffer irreparable harm if injunctive
 23 relief is not granted." Vision Sports, Inc. v. Melville Corp., 888 F.2d 609, 612 (9th Cir. 1989).

24 Given Plaintiff's showing of the "likelihood of confusion" resulting from Defendant's
 25 infringement, Plaintiff's irreparable harm is presumed, and therefore sufficient for purposes of
 26 this motion.

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1 **IV. CONCLUSION**

2 Balancing the Sleekcraft factors, the likelihood of confusion resulting from Defendant's
 3 infringement of Plaintiff's "DATA911" is without question. Defendant has taken Plaintiff's
 4 incontestable and federally registered mark for its own use in marketing its new trade name
 5 "microDATA911." Any claim that the addition of the term "micro" to "DATA911"
 6 substantively changes its character or creates a new and inherently distinctive mark is without
 7 merit. Plaintiff has dedicated almost 20 years to cultivating and marketing its products and
 8 services under the "DATA911" mark and has built name brand recognition. Defendant's
 9 calculated infringement of the same mark for use in the same industry, for the purpose of
 10 marketing the same or similar goods to the same consumers is specifically intended to capitalize
 11 on that goodwill to sell its competing products. The law holds that Plaintiff's irreparable harm is
 12 presumed under these circumstances.

13 For all of the foregoing reasons, Plaintiff respectfully requests this Court to enter an
 14 order (a) granting Plaintiff's motion for a preliminary injunction and granting to Plaintiff such
 15 other and further relief as the Court may deem just and proper. Specifically, Plaintiff seeks a
 16 preliminary injunction as follows:

17 (1) prohibiting Defendant from using for any purpose the trademark "Data911"
 18 which has been continuously used in commerce by Plaintiff and its predecessor in interest since
 19 1989;

20 (2) requiring Defendant to change its trade name so that the phrase "Data911" will
 21 not be included in such name;

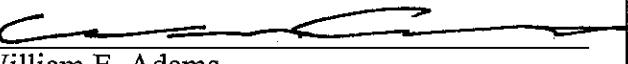
22 (3) requiring Defendant to turn over possession and control to Plaintiff of the
 23 internet domain name "microdata911.com;"

24 (4) requiring Defendant to deliver up to Plaintiff's counsel for destruction any
 25 materials that contain imitations of the trade name or that contain marks that are confusingly
 26 similar to the Plaintiff's trademark, logo, or advertising, including any that include the term
 27 "Data911"; and

1 (5) ordering expedited discovery to determine the extent and breadth of Defendant's
2 infringing activities.

3 Dated: June 21, 2007

FITZGERALD ABBOTT & BEARDSLEY LLP

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5 By 
William E. Adams
6 Attorneys for Plaintiff HUBB SYSTEMS, LLC
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PROOF OF SERVICE - F.R.C.P. §5

I, the undersigned, declare: I am employed in the County of Alameda, State of California. I am over the age of 18 and not a party to the within action. I am employed by Fitzgerald Abbott & Beardsley, located at 1221 Broadway, 21st Floor, Oakland, CA 94612. I am readily familiar with this firm's business practice of processing of documents for service.

I hereby certify that on **June 22, 2007**, a true and correct copy of the following document(s) was filed electronically:

**NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION;
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION
FOR PRELIMINARY INJUNCTION**

Notice of this filing will be sent by operation of the United States District Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties listed below will be served by the method indicated:

R. Prescot Jaunich
DOWNS RACHLIN MARTIN PLLC
199 Main Street, P. O. Box 190
Burlington, Vermont 05402
Telephone: 802-863-2375
Faxsimile: 802-862-7512
Email: sjau nich@drm.com

**Counsel for Defendant microDATA GIS,
Inc.**

<input checked="" type="checkbox"/>	U.S. Mail - By placing a copy of said document(s) in a sealed envelope with postage thereon fully prepaid, and depositing said envelope with the U.S. Postal Service, following this firm's business practices.
<input type="checkbox"/>	Federal Express - By placing a copy of said document(s) in a sealed pre-paid overnight envelope and deposited with Federal Express, following this firm's business practices.
<input type="checkbox"/>	By Personal Service - I caused such envelope to be delivered by hand on the office(s) of the addressee(s).

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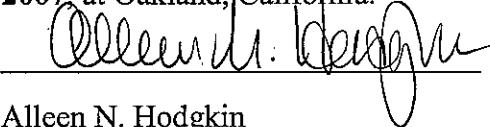
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1
2 Facsimile - By placing a true copy thereof into a facsimile machine to the fax number
stated above, as evidenced by the attached transmission report.

3 I declare under the penalty of perjury under laws of the State of California that the
4 foregoing is true and correct. Executed on **June 22, 2007** at Oakland, California.

5 
6 Alleen N. Hodgkin

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